No. 82-2145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DAVID L. HOLTON, *et al.*,
Petitioners

v.

GEORGE H. BENFORD,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a public employee is entitled to an immediate appeal from the denial of a motion for summary judgment based upon a claim of qualified immunity.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. The Proceedings Below

The proceedings below arise out of respondent's suit for damages against certain congressional "employees".[1] Those employees conspired with the American Broadcasting Company ("ABC") surreptitiously to videotape and broadcast a sales meeting among plaintiff, the manager of an insurance agency, and three petitioners who posed as insurance prospects. The fourth petitioner, defendant Kathleen Gardner-Cravedi, had previously assumed a false identity and thereby obtained employment as a sales

[1] At their depositions, Petitioners Holton and Gardner-Cravedi refused on grounds of privilege to divulge the terms of their employment or the scope of their duties. Petitioners Hamburger and Teitelbaum, the record indicates, were "volunteer" members of the Staff of the Select Committee on Aging.

trainee with plaintiff's insurance agency. Having gained plaintiff's confidence, she induced him to attempt to make the sale. He, of course, knew neither the identity of the meeting participants nor that ABC cameras were recording the transaction for a subsequent broadcast. See *Benford v. ABC*, 502 F. Supp. 1148 (D. Md. 1980), *aff'd by unpublished order*, 661 F.2d 917 (4th Cir.) [table], *cert. denied sub nom. Holton v. Benford*, 454 U.S. 1060 (1981). After ABC televised an excerpt from the meeting and an explanation of how it was arranged, plaintiff sued.

In April, 1980, petitioners filed a motion to dismiss on the ground that the Speech or Debate Clause immunized them from liability for their conduct and that, in any event, their status as federal employees dictated dismissal of the action. The district court denied the claim of Speech or Debate Clause immunity. It held, in reliance upon this Court's decisions in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Gravel v. United States*, 408 U.S. 606 (1972), that the Speech or Debate Clause does not shield efforts to disseminate information outside the halls of Congress. *Benford v. ABC*, *supra*, 502 F. Supp. at 1153-1156. The court held further that the Speech or Debate Clause would not immunize defendant's conduct if, as alleged, that conduct was illegal. 502 F. Supp. at 1155. Finally, the court ruled, defendants would be entitled to a defense of qualified immunity if they made a "proper showing" that the taping and broadcasting in suit were authorized. 502 F. Supp. 1159. Petitioners appealed, and sought certiorari from the fourth circuit's *per curiam* affirmance, 661 F.2d 917 of the district court's order.[2] This Court declined to issue the writ.

After this Court decided *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the district court *sua sponte* requested

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[2] The court of appeals' unpublished memorandum affirming the district court is printed as an appendix to the *certiorari* petition in *Holton v. Benford*, No. 81-452 (October Term, 1981).

the parties to address the impact of that case upon this one. Pending resolution of that question, the district court restored the stay of discovery against petitioners that had been substantially in effect during virtually the entire course of the litigation.

B. The Decisions Below

1. *The District Court*

After extended deliberation, the district court denied petitioners' motion for summary judgment on two grounds. First, the court held that defendant had produced ". . . no record evidence to indicate any individual member of Congress or staff member of the Select Committee possesses the actual power to arrange and/or authorize the public broadcasting of the November 3, 1978 [sales] meeting. Nor is this Court aware of a House resolution or Court order which granted the Congressional defendants power to broadcast with ABC, the plaintiff's November 3, 1978 meeting." (Pet. 23B). Second, the court held that both Title III of the Omnibus Crime Control and Safe Streets Act and the Maryland Wiretapping and Electronic Surveillance Act accorded plaintiff "clearly established" rights that defendants could not violate with impunity despite their status as public employees. (See Pet. 10B-13B, 16B-20B).[3] The court noted in passing, however, that ". . . if the congressional defendants [had] acted within the scope of their authority, . . ." they would have been entitled to judgment on the common law counts alleged in the complaint. (Pet. 20B). That result, the district court held, flowed from this Court's decision in *Harlow v. Fitzgerald, supra.* (Pet. 15B, 20B). Accordingly, the court denied the motion for summary judgment

[3] The statutes petitioners allegedly violated are cited and quoted *verbatim* in the district court's opinion at Pet. 10B-11B and 16B-18B. Both statutes generally prohibit electronic recording and disclosure of oral communications without the consent of the parties except in narrowly defined circumstances not present here.

and authorized respondent to begin the discovery that had been denied to him almost from the outset of the litigation.

2. *The Court Of Appeals*

Petitioners appealed, and respondent moved to dismiss the appeal as interlocutory. By *per curiam* order, the court of appeals granted the motion. In an unpublished Memorandum Opinion,[4] the court explained that "Finality as a condition to appellate review was written into the first Judiciary Act. . . ." and has been departed from only when its observance would practically defeat the right to any review at all." (Pet. 4A, quoting *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). Here the denial of summary judgment did not ". . . finally determine []. . . ." whether petitioners' claim of immunity would ultimately be sustained, the court held. The claim could therefore be reviewed if and when respondent obtained a final judgment against petitioners. (Pet. 7A, 9A). In addition, the "degree" of petitioners' immunity, *i.e.*, the applicable legal standard, was settled in *Harlow, supra.* (Pet. 7A). Consequently, petitioners did not satisfy the exception to the finality requirement for the "small class" of decisions presenting "serious and unsettled", "important" questions of law raised in a context so independent of the merits as to escape review if the court strictly applied the statutory prohibition upon non-final appeals. (Pet. 5A, 7A). Nor did petitioners base their claim to summary judgment upon an express constitutional provision, the only remaining circumstance justifying a non-statutory, interlocutory appeal. (Pet. 9A). The court of appeals declined to read *Harlow v. Fitzgerald, supra*, as granting millions of public employees the right automatically to appeal denials of inter-

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[4] Rule 18(a) of the Fourth Circuit's Rules lists criteria that must be met before an opinion *may* be published. Compare Pet., p. 8. The remainder of the Rule specifies the consequences of a determination not to publish an opinion. See *infra*, p. 10.

locutory motions for summary judgment based upon claims of qualified immunity, given their ability to present facts at trial that might sustain the defense. Accordingly, the circuit court dismissed petitioners' appeal from the district court's order.

REASONS FOR DENYING THE WRIT

A. The Decision Below Is In Accord With Controlling Decisions Of This Court

This Court has repeatedly held that:

> The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment. First Judiciary Act, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); see *McLish v. Roff*, 141 U.S. 661. This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases. See *Cobbledick v. United States*, 309 U.S. 323, 324-326. (*DiBella v. United States*, 369 U.S. 121, 124 (1962)).

Accord, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-374 (1981) (citing other civil cases). In "a small class" of cases, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this Court has authorized a departure from the ". . . firm congressional policy against interlocutory or 'piecemeal' appeals. . . ." *Abney v. United States*, 431 U.S. 651, 656 (1977). But this case does not come within that class. First, the order below does not " '. . . resolve an important issue completely separate from the merits of the action. . . .' " *Firestone, op. cit., supra*, 449 U.S. at 375, *quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). See also, *Parr v. United States*, 351 U.S. 513, 519 (1956); *United*

States v. McDonald, 435 U.S. 850, 859 (1977). On the contrary, whether petitioners are immune from suit on the facts here is an affirmative defense that ". . . goes to the very heart of the issues to be resolved at the upcoming trial." *Abney, op. cit., supra*, 431 U.S. at 663. (Challenge to sufficiency of indictment not reviewable.)

Second, petitioners' immunity claim can ". . . effectively be reviewed following judgment on the merits." *Firestone, op. cit., supra*, 449 U.S. at 377, since petitioners may proffer evidence and proposed jury instructions to establish their defense at trial, thus preserving the issue for appeal should the jury find for plaintiff. Yet, "only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle." *United States v. Ryan*, 402 U.S. 530, 533 (1971), *quoted as authoritative in Firestone, op. cit., supra*, 449 U.S. at 376. Third, the claimed immunity is not ". . . a right which would be 'lost probably irreparably' if review had to await final judgment . . ." *Abney v. United States*, 431 U.S. 651, 658 (1977). Compare *Stack v. Boyle*, 342 U.S. 1, 6 (1981) with *United States v. McDonald*, 435 U.S. 850, 856 (1978). Most important, the order denying summary judgment fails to satisfy the "threshold requirement of a fully consummated decision. . . ." *Id.* at 859 (citation omitted). *Accord, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). For, however vigorously petitioners may dispute the circuit court's reading of the district court's decision (Pet. pp. 7-8, 12), the fourth circuit's view that petitioners may revive their immunity claims at trial is now the law of this case. See *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947); 5 Am. Jur. 2d *Appeal and Error* § 744 (1962). Furthermore, a party is not entitled to summary judgment unless, ". . . viewed in the light most favorable to the opposing party," movant's evidentiary materials show that he is entitled to judgment as a matter of law. *Adickes v. Kress & Co.*,

398 U.S. 144, 157 (1970). A trial defendant will prevail unless plaintiff proves his case by a preponderance of the evidence. Given the difference in those standards, it is hardly surprising that a *denial* of summary judgment is *not* an appealable order. *Freeman v. Kohl & Vick Machine Works*, 673 F.2d 196, 200 (7th Cir. 1982), *following Pacific U. Conference v. Marshall*, 434 U.S. 1305 (1977); *United States v. Florian*, 312 U.S. 656 (1941). Thus, the decision below followed controlling decisions of this Court. Certiorari should be denied.

B. The Court Below Properly Dismissed Petitioners' Appeal Because The District Court Did Not Decide A "Serious And Unsettled Question Of Law"

Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982) teaches that a pre-judgment appeal should be dismissed unless, in addition to satisfying the other criteria set out above, the challenged order "'. . . present[s] a serious and unsettled question.'" *Nixon v. Fitzgerald*, 102 S.Ct. 2690, 2698 (1982), *quoting and explaining Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1947). The court below correctly found that petitioners' appeal did not present such a question (Pet. 8A-9A). In *Nixon*, *supra*, this Court held appealable a decision that the President of the United States was amenable to suit, thus confronting "a threatened breach of essential Presidential prerogatives under the separation of powers doctrine. . ." *Nixon v. Fitzgerald*, 102 S.Ct. 2690, 2698 (1982). In *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the Court held appealable a similar decision that "seven White House aides" who also claimed absolute immunity could be sued. *Harlow*, *supra*, 102 S.Ct. at 2732, n.11.[5] Clearly, the trial court's orders in those cases decided "'serious and unsettled' question[s]" 102 S.Ct. at 2698. The President and his "senior aides and advisors" are critical to the functioning of the Government. Whether they may be

[5] In *Harlow*, this Court held that "the discussion in *Nixon* establishes our jurisdiction in this case as well. . . ." *Id.*

sued presents a question so important that an erroneous district court determination of that point of law must be promptly reversed.

The district court order here presented no such question. The order merely preliminarily denied the immunity claims of *temporary* Congressional employees and minor functionaries of a House "Select Committee", and applied settled law to particular facts.[6] Equally important, the district court's decision rested upon determinations that petitioners had produced no evidence that they or the Select Committee were authorized to engage in the conduct in suit and that petititioners reasonably lacked knowledge of the statutory prohibitions on electronic eavesdropping. (Pet. 9B-13B, 20B, 24B. See also *id.* at 6A.) Those determinations are factual and if reviewed would not establish meaningful principles to be applied in future cases. A ruling that such factual determinations are immediately appealable would ". . . open[] the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit." *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). See *Firestone Tire & Rubber Co., supra*, 449 U.S. 368, 378-379; *Donlon Ind., Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968). That consideration weighs heavily here because the official immunity defendants claim may also be claimed by some 16,000,000 federal, state, and local employees should they be sued for misconduct allegedly arising out of their employment. United States Department of Labor, Bureau of Labor Statistics, Employment and Earnings, Feb., 1983.[7]

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[6] *Harlow* establishes the substantive law and the procedure to be applied in adjudicating the immunity claims of public employees like petitioners who are not entitled to absolute immunity. 102 S.Ct. 2727, 2738-2740.

[7] The cited publication reports that in November, 1982 federal civilian employment totalled 2,726,000 and state and local employ-

The decision below does not conflict with *Harlow v. Fitzgerald*, 102 Sup. Ct. 2727 (1982), as petitioners contend. (Pet. p. 12). Since the *Harlow* petitioners claimed *absolute* immunity, *Harlow* could not possibly have held that denials of qualified immunity are immediately appealable. Nor does *Harlow* imply that they are. To minimize the disruptive impact of "insubstantial claims," *Harlow* modified the elements of the qualified immunity defense, and precluded discovery pending an initial ruling on summary judgment. 102 Sup. Ct. 2739. If, despite these advantages, a defendant is unable to persuade a learned trial judge that defendant is immune, plaintiff's claim can no longer be deemed "insubstantial." Hence, the concern underlying *Harlow*'s special protections for public employees does not argue for automatic appeals. Moreover, this Court apparently contemplated that immunity claims presented on summary judgment would be "appropriately determine[d] by the trial judge." *Id.* Had this Court thought otherwise, it would have remanded *Harlow* to the court of appeals rather than to the district court.

An occasional erroneous denial of immunity to low level government employees like petitioners presents no occasion for the extraordinary judicial concern that makes some absolute immunity denials appealable. See *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979). *Accord*, *Forsyth v. Kleindienst*, 700 F.2d 104, 106 (1983) (Sloviter, J., dissenting from referral of motion to dismiss to merits panel).[8] The *Nixon* rule limiting interlocutory appeals from denials of *absolute* immunity claims

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ment 13,256,000. The official immunity doctrine announced in *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982) applies to state and local employees. See *id.*, 102 S.Ct. at 2737, 2738 citing and following *inter alia Wood v. Strickland*, 420 U.S. 308 (1975) and *Procunier v. Navarette*, 434 U.S. 555 (1978). *See also* 102 S.Ct. 2738, n. 30.

[8] Where federal trial courts err, defendants may seek certification and permission to appeal. 28 U.S.C. § 1292(b). In light of the rules laid down in *Harlow*, that protection suffices.

thus dictated the circuit court's dismissal of petitioners' appeal from a denial of their claims to *qualified* immunity.

C. Even If The Question Presented Were Important Certiorari Would Be Inappropriate Here

Even if the question presented were certworthy, the apparent conflict between the decision of the court below and *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982) would not warrant review of the fourth circuit's decision. That court determined not to publish its opinion. Hence, the court distributed it only to counsel and the court clerk. Rules of the United States Court of Appeals for the Fourth Circuit, Rule 18 (c)(ii). Unpublished opinions bind neither the district courts in the fourth circuit nor the court of appeals. *Hupman v. Cook*, 640 F.2d 497, 501, n.7 (4th Cir. 1981); *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980). Thus, the decision below does not establish a meaningful conflict between the circuits. Were this Court to treat unpublished opinions like the one below as certworthy, moreover, the number of frivolous certiorari petitions would surely increase since counsel would no longer be deterred from seeking review here by the court of appeals' determinations to treat matters summarily.

Cases in other circuits indicate that the time is not yet ripe for this Court to decide the question presented. The third circuit is currently considering the question whether an order denying qualified immunity is immediately appealable. *Forsyth v. Kleindienst*, 700 F.2d 104 (3d Cir. 1983). The eighth circuit, in a decision rendered on June 30, 1983, has declined to follow *McSurely*'s broad reading of *Nixon* and *Harlow*. That court has held that only where the facts are undisputed and the issue is solely one of law will an order denying absolute or qualified immunity be deemed appealable. *Evans v. Dillahunty*, No. 82-2362, decided June 30, 1983. Neither opinion sug-

gests that the officials claiming immunity had failed to produce evidence that their conduct was authorized. Either of these cases would present more satisfactory vehicles than the decision below for settling the issue. Indeed, we submit, since the lower courts have just begun to grapple with the question what circumstances justify entertaining interlocutory appeals from denials of summary judgment to government employees claiming qualified immunity, prudence suggests that this Court await ". . . a concensus or a satisfactory majority view among the lower courts" before bringing the question here. Stern & Gressman, Supreme Court Practice, 269, n.32 (1978).[9]

Simple justice points in the same direction. Petitioners have already had one round of appeal and certiorari on their immunity claims. *Benford v. ABC*, *supra*, p. 2. In effect, they now seek another. The established law prohibiting review of all but a handful of non-final trial court decisions exists to block ". . . the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise. . . ." *Firestone Tire & Rubber Co. v. Risjord*, *supra*, 449 U.S. 368, 374, *quoting Cobbledick v. United States*, 309 U.S. 323, 325 (1940). The finality rule also ". . . emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone*, *op. cit.*, *supra*. Those values have already been severely offended by petitioners' "piecemeal" approach to this litigation. For that reason, even if the

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[9] Petitioners' unsupported assertion that the District of Columbia and Fourth Circuits ". . . have jurisdiction over the two geographic areas containing the heaviest concentration of government officials in the nation." (Pet. p. 14) probably reflects their inadvertent failure to recognize that state and local employees far outnumber federal. See note 7, *supra*.

question presented should be resolved by this Court, we respectfully submit that the *per curiam*, unpublished decision below presents an inappropriate vehicle.

The contempt finding issued against the Clerk of the House hardly warrants granting certiorari here. That order is appealable, and the Clerk, represented by the same counsel as petitioners, has appealed. *Alexander v. United States*, 201 U.S. 117 (1906); *United States v. Ryan*, 402 U.S. 530, 533 (1971). If, as appears, petitioners contend that the subsequent discovery controversy demonstrates that they should have been granted immunity, the argument proves too much: any suit against a government employee can lead to conflicts over what documents a public authority may withhold. The implication—that government employees should be immune from suit in order to protect the government's files—is foreclosed by *Harlow v. Fitzgerald*, *supra*. And if petitioners mean to suggest that the issues in the contempt proceeding somhow bear on this one, we are confident that this Court will not be persuaded.[10] Petitioners' curious argument implies their recognition that, given the circumstances, this Court should deny certiorari.

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[10] Since petitioners have not clearly articulated their position, we cannot satisfactorily rebut it. But since they appear to rely upon the contempt order, we have printed most of the lower court's opinion as an Appendix to this Opposition so that the Court may see for itself that the later order has no bearing on the issues tendered. We are confident that this Court will not assume that the fourth circuit will not properly resolve whatever issues are presented on appeal from the contempt citation. In any event, those issues could not be reached even if certiorari were granted here.

CONCLUSION

For the reasons set out above, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., and MRS. ISAAC (BETTY) HAMBURGER, MISS KATHLEEN T. GARDNER, MRS. LILLIAN M. TEITELBAUM, DAVID L. HOLTON and MARGARET OSMER

Filed June 24, 1983

Wilson K. Barnes, and Little, Hall, & Steinmann, P.A., of Baltimore, Maryland; Dean E. Sharp, of Washington, D.C., and George B. Driesen, of New York, for plaintiff.

Stanley M. Brand, Steven R. Ross and Michael L. Murray, Office of the Clerk, United States House of Representatives, of Washington, D.C., for respondent, the Clerk of the United States House of Representatives, Benjamin J. Guthrie.

Northrop, Senior Judge.

Presently before the Court is the plaintiff's motion requesting that this Court hold Benjamin J. Guthrie, Clerk of the United States House of Representatives in contempt of court for failure to comply with a subpoena *duces tecum.*

* * * *

On March 22, 1982, shortly before the Supreme Court's decision in *Harlow v. Fitzgerald*, the plaintiff caused a *subpoena duces tecum* to be issued and served upon Mr. Guthrie's predecessor in office, Benjamin L. Henshaw, Jr. It demanded that as a non-party witness, he or his authorized representative produce certain documents rele-

vant to this case. Counsel for Mr. Henshaw, the same counsel who represent the congressional defendants, filed a motion to quash on his behalf, arguing that this Court lacked jurisdiction to issue the subpoena at the United States Capitol. This Court's decision was stayed pending review of the above-mentioned *Harlow v. Fitzgerald* motions, and on January 26, 1983, the motion to quash was denied. The Clerk was ordered to arrange a time before April 30, 1983, for plaintiff's counsel to inspect certain of the documents described in the subpoena. *See Benford v. American Broadcasting Companies*, Civil No. 79-2386 (D.Md. Jan. 28, 1983).[1] In response to that order, Congressional counsel advised this Court "that we are reserving the right to enter and interpose timely objections to production to specific or general categories of documents in a timely fashion . . ." (Transcript of proceedings of January 26, 1983, pages 32, lines 13-16).

On February 25, 1983, the Select Committee on Aging of the United States House of Representatives filed a motion to intervene to obtain a protective order from the subpoena *duces tecum*. Counsel for the Select Committee, the same counsel who represent the Clerk and the congressional defendants, appeared on the Select Committee's behalf. They generally contended that the subpoena requested documents protected by the Speech or Debate Clause of the United States Constitution, and that the Select Committee's intervention was necessary to raise this defense. On April 26, 1983, for the reasons fully set forth in *Benford v. American Broadcasting Companies, Inc.*, Civil No. 79-2386 (D.Md. May 2, 1983), the Select

[1] Each document ordered to be produced was described in or pertained to the veracity of the affidavits of the Select Committee Chairman, Claude Pepper (D. Fla.), and of defendant Holton, the Select Committee's Chief Investigator, which were submitted in support of the congressional defendants' Harlow v. Fitzgerald motions. These documents were not "attached thereto" as is required by FED. R. CIV. P. 56(e), and are still of potential relevance to, among other things, the congressional defendants' immunity claims.

Committee's motion to intervene was denied. This Court suggested that the Clerk, and not the Select Committee, should raise these Speech or Debate Clause claims. The Court further described exactly what kind of format was acceptable. It was suggested that the Clerk submit to the Court a detailed index and description of the documents and portions of documents alleged to be beyond review, and a statement of the reasons therefor. At a minimum, the documents would then be reviewed *in camera*. It was made vividly clear that such a motion would be entertained even though April 30 had passed. *Cf. Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

Nevertheless, the Clerk failed to act, apparently in deference to a resolution passed by the United States House of Representatives on April 28, 1983, two days after the hearing and four days prior to the release of this Court's written opinion. The resolution reads, in part, as follows:

> *Resolved*, That the House considers the subpoena an unwarranted and unconstitutional invasion of its constitutional prerogative to determine which of its proceedings shall be made public, and in direct contravention of the constitutional protection for congressional investigative activity; and be it further *Resolved*, That the Clerk of the House be, and hereby is ordered and directed not to produce for inspection and copying by plaintiff or any of his representatives, or to the court for inspection, any of the investigative records of the select committee sought by the subpoena . . . H.R. 176, 98th Cong., 1st Sess., 129 Cong. Rec. 56, 2450-2457 (1983).

The plaintiff then filed the instant motion. Now this Court faces the distasteful task of having to decide whether the Clerk of the United States House of Representatives should be held in contempt of Court.

DISCUSSION

There is no question that this Court possesses the inherent power to enforce compliance with its lawful orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). Civil contempt occurs when it has been proven by clear and convincing evidence that a person refused to do what he was ordered to do. *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 449, 31 S.Ct. 492, 501, 55 L.Ed. 797 (1981); *In Re Irving*, 600 F.2d 1027, 1037 (2d Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 137, 62 L.Ed. 2d 89 (1979). The fact that the respondent in this case is the Clerk of the United States House of Representatives does not exempt him from this process. Indeed, FED. R. CIV. P. 45(b) explicitly provides that "any person" who disobeys an order of the court may be held in contempt. *Cf. United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974) (where the Supreme Court inferred that this would include the President, but suggested that it was arguable he was an exception to the rule).

What is most unfortunate here is that the United States House of Representatives' resolution, referred to earlier, deliberately ordered the Clerk to disobey this Court. The House suggested *it* would determine which of the Select Committee documents, if any, could be reviewed by this Court or by the plaintiff.

I cannot help but express my deep and profound concern that any member of Congress would vote in favor of a resolution which would bar evidence from a court of the United States. Such a blanket assumption of power questions the very integrity of our constitutional structure and challenges the ruling of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). There, Chief Justice Marshall stated: "[i]t is emphatically the province and duty of the judicial department to say what the law is."

In the case now before the Court, it is the province and duty of this Court, and not the United States House of Representatives, to say what documents are and are not protected by the Speech or Debate Clause. Because the Clerk has chosen to honor this resolution, which was never reviewed by the House Committee on the Judiciary, this Court has not received the Clerk's Speech or Debate claims, and has not had an opportunity to determine if they have any merit. Had motions been filed by the Clerk, as outlined above, and this Court's warnings been heeded, this hearing would not have occurred.

Considering these facts, this Court has no choice but to hold Benjamin J. Guthrie, the Clerk of the United States House of Representatives, in contempt of this Court. For every day this contempt continues, the Clerk shall be fined $500.00.

I will, however, stay the imposition of the fine for six days to give the Clerk the opportunity to either appeal this decision, produce the documents, or to present to this Court his specific objections. In the event objections are filed, a detailed index of the documents held in his custody and described in the subpoena *duces tecum* should be provided, and each objection should be fully and specifically raised. This Court reserves the right to examine *in camera* any and all of these documents in order to assure their contents have been accurately characterized.

If this six-day period lapses, and the Clerk fails to properly appeal, produce, or object, the stay of the fine will be lifted. Of course any stay of the fine imposed will continue so long as a duly filed motion is under consideration or an appeal remains undecided.

The plaintiff's request for attorneys' fees will be considered once the Clerk purges himself of this contempt.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge

Dated: 24 June 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., and MRS. ISAAC (BETTY) HAMBURGER, MISS KATHLEEN T. GARDNER, MRS. LILLIAN M. TEITELBAUM, DAVID L. HOLTON and MARGARET OSMER

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated in open court, IT IS, this 24th day of June, 1983, by the United States District Court for the District of Maryland,

ORDERED:

1. That the Clerk of the United States House of Representatives Benjamin J. Guthrie BE, and he hereby IS, held in contempt of court for failure to obey a *subpoena duces tecum* issued by this Court;

2. That the Clerk of the United States House of Representatives shall pay into the Registry of this Court a sum of $500 for every day this contempt continues; however,

(a) The imposition of this fine is stayed until July 8, 1983 to give the Clerk the opportunity to either appeal this decision, produce the documents requested, or file appropriate objections thereto;

(b) If this time period lapses, and the Clerk fails to properly appeal, produce, or object, the stay of the fine will be lifted;

(c) Any stay imposed will continue so long as a duly filed motion is under consideration or an appeal remains undecided, or the contempt is lifted by virtue of the Clerk's having purged himself of this contempt.

3. That the Clerk of this Court shall mail copies of the foregoing Memorandum and of this Order to counsel in this case.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge